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Bankruptcy - Section 522(d)(10)(E) - Debtor May Not Exempt Future Keogh Fund Payments from the Bankruptcy Estate

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BANKRUPTCY—SECTION 522(d)(10)(E)—DEBTOR MAY NOT EXEMPT FUTURE KEOGH FUND PAYMENTS FROM THE BANKRUPTCY ESTATE

Clark v. O'Neill (In re Robert H. Clark) (1983)

Robert H. Clark, a forty-three year old licensed marriage and family therapist, filed a voluntary petition under Chapter 7 of the Bankruptcy Code (Code),[1] listing his Keogh retirement account,[2] valued at $31,218.00,[3] as exempt from the property of his bankruptcy estate[4] under section 522(d)(10)(E) of the Code.[5] The interim trustee objected to the claimed ex-

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1. Clark v. O'Neill (*In re* Robert H. Clark), 711 F.2d 21, 22 (3d Cir. 1983). The petition was filed on September 18, 1981. *Id.* The Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (1982), or Bankruptcy Code (Code), provides two alternative avenues of relief for the individual debtor. Chapter 7 is essentially a liquidation device for the orderly distribution of the debtor's assets to his creditors, resulting in a discharge of the debtor from his obligations. *See* A. COHEN, BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS ¶ 13-301, at 46 & n.2 (1981). Alternatively, under Chapter 13 of the Code, an individual debtor with a regular income may obtain confirmation of a plan providing for adjustment of his debts and receive a discharge. *Id.*

2. 711 F.2d at 22. The Self-Employed Individuals Tax Retirement Act of 1962 authorized Keogh plans in an effort to place a self-employed individual—sole proprietor or partner—making retirement-fund contributions for his own benefit on an equal footing with an employee who benefits from a plan established by his employer. *See* S. REP. NO. 992, 87th Cong., 1st Sess. 8, *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 2964, 2971. This is accomplished by treating the self-employed person as both an owner and employee. *Id.* at 10. Contributions to Keogh plans are tax deductible from current income to a limited extent for the owner/employee. I.R.C. § 404(a)(8) (1982). Assets held in Keogh funds are not taxable to the beneficiary until they are actually distributed. *Id.* § 402(a)(1). However, the beneficiary's right to receive the funds vests at the time the contribution is made. *Id.* § 401(d)(2)(A). In the event the beneficiary withdraws funds from the Keogh account before he reaches 59½ years of age, he is barred from making tax exempt contributions to the plan for five years. *Id.* § 401(d)(5)(C). Moreover, the beneficiary who prematurely withdraws Keogh funds must pay a 10% penalty tax in addition to the income tax due on the amount withdrawn. *Id.* § 72(m)(5).

3. Clark v. O'Neill (*In re* Robert H. Clark), No. 82-0494, slip op. at 2 (Bankr. D.N.J. Sept. 28, 1982). Clark established his I.R.S.-approved retirement account on December 20, 1975. *Id.* As of July 30, 1982, his account had a market value of $31,218.00. *Id.*

4. 711 F.2d at 22. Under the Code, the commencement of a case creates an estate consisting of property of the debtor to become available for distribution to creditors. *See* 11 U.S.C. § 541(a) (1982). *See also* A. COHEN, *supra* note 1, at 52.

For a further discussion of the determination of the property of the estate, see notes 43-45 and accompanying text *infra.*

5. 711 F.2d at 22. Clark elected to claim an exemption for the Keogh account under § 522(d)(10)(E) of the Code. *Id.* Section 522(d)(10)(E) provides as follows:

emption.[6] Clark, in turn, filed a complaint in the United States Bankruptcy Court for the District of New Jersey, seeking a denial of the objection.[7]

The sole issue before the bankruptcy court was whether the assets in Clark's Keogh retirement account, from which he had not withdrawn any funds, were protected from the reach of his creditors under section 522(d)(10)(E), which exempts "[t]he debtor's right to receive . . . a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor . . . ."[8] The bank-

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> (d) The following property may be exempted under subsection (b)(1) of this section:
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> . . . .
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> (10) The debtor's right to receive—
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> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor, unless—
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> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
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> (ii) such payment is on account of age or length of service; and
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> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C. [§§] 401(a), 403(a), 403(b), 408 or 409 [(1982)].

11 U.S.C. § 522(d)(10)(E) (1982). Subsection (iii) requires that the plan for which an exemption is claimed fall within those sections of the Internal Revenue Code which define the pension, stock bonus, or profitsharing plans, annuities, individual retirement accounts and retirement bonds which qualify for favorable tax treatment. *See* I.R.C. §§ 401(a), 403(a), 403(b), 408, 409 (1982).

6. 711 F.2d at 22. The essence of the interim trustee's objection was that Clark's claimed exemption did not fall within the literal terms of § 522(d)(10)(E) because he had no present "right to receive [payments]" from his Keogh plan. *See id.* For a discussion of the approaches courts have taken to the argument that § 522(d)(10)(E) requires a present entitlement, see notes 53-57 and accompanying text *infra.*

7. 711 F.2d at 22. *See In re* Robert H. Clark, No. 82-0494 (Bankr. D.N.J. Sept. 28, 1982).

8. 711 F.2d at 22 & n.1 (quoting 11 U.S.C. § 522(d)(10)(E) (1982)). The bankruptcy court did not consider whether the Keogh fund was properly included within the gross bankruptcy estate, but only whether these assets, once included, fell within the § 522(d)(10)(E) exemption. *See id.*

Three distinct arguments have been advanced to protect the different forms of retirement-fund assets from distribution to creditors in bankruptcy. The first is that the fund is analogous to a spendthrift trust, and thus excluded from the bankruptcy estate under § 541(c)(2), which provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2) (1982). *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983); Clotfelter v. CIBA-GEIGY Corp. (*In re* Threewitt), 24 Bankr. 927 (D. Kan. 1982). For a discussion of this approach, see note 45 *infra.* The second argument is that the prohibitions against assignment and alienation of retirement funds, set forth in sections 206(d)(1) and 1021(c) of the Employee Retirement Income Security Act of 1974, constitute federal law exemptions. *See* 11 U.S.C. § 522(b)(2)(A) (1982). *See also* Barr v. Hinshaw (*In re* Hinshaw), 23 Bankr. 233 (Bankr. D. Kan. 1982). For a discussion of this analysis, see ruptcy court found that Clark would have no "right to receive [payments]" from his Keogh fund for several years.[9] Consequently, the court held that his claimed exemption of future payments did not come within the literal terms of section 522(d)(10)(E).[10] On appeal, the United States Court of Appeals for the Third Circuit[11] affirmed, *holding* that section 522(d)(10)(E) of the Code does not exempt future Keogh fund payments from the debtor's bankruptcy estate. *Clark v. O'Neill (In re Robert H. Clark),* 711 F.2d 21 (3d Cir. 1983).

The Bankruptcy Reform Act of 1978 (Code) was the product of a ten-year congressional effort to analyze, evaluate, and revise federal bankruptcy law.[12] An overriding purpose of the Code is to provide the individual debtor

note 51 *infra.* The final argument is that raised by Clark in this case: that Keogh fund assets, though properly included in the gross bankruptcy estate, fall within the § 522(d)(10)(E) exemption for pension and annuity payments. *See Robert Clark,* No. 82-0494, slip op. at 2. For a discussion of the various approaches to exempting retirement benefits under § 522(d)(10)(E), see notes 53-79 and accompanying text *infra.*

9. *Robert Clark,* No. 82-0494, slip op. at 2. The bankruptcy court found that "the debtor . . . may not, without penalty, withdraw funds from said account until he attains the age of 59 and one-half years. An exception is the occurrence of death or disability." *Id. See* I.R.C. § 401(d)(4)(B) (1982). *See also* J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION § 96 (2d ed. 1973). For a discussion of the restrictions on Keogh plans, see note 2 *supra.*

10. *See* 711 F.2d at 22. The bankruptcy court reviewed the legislative history of § 522(d)(10)(E), specifically the parallel retirement fund exemption provisions of earlier proposals. *Robert Clark,* No. 82-0494, slip op. at 3-5 (citing UNIFORM EXEMPTIONS ACT § 6, 13 U.L.A. 365, 381-82 (1980); PROPOSED BANKRUPTCY ACT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES § 4-503(c), REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, Part II, 93d Cong., 1st Sess. 125 (1973) [hereinafter cited as COMMISSION REPORT]. For the text and a discussion of these provisions, see notes 47 & 50 and accompanying text *infra.* The court noted that Congress had considered and rejected broad language clearly extending the exemption to all retirement plan interests, regardless of when rights accrued. *Robert Clark,* No. 82-0494, slip op. at 7-8. The bankruptcy court concluded that in adopting the "payments made" language of § 522(d)(10)(E), Congress had rejected the suggestion to include all funds constituting debtors' retirement plan accounts. *Id.* at 8 (citing *In re* Richard Clark, 18 Bankr. 824 (Bankr. E.D. Tenn. 1982); *In re* Mendenhall, 4 Bankr. 127 (Bankr. D. Ore. 1980)). For a discussion of *Richard Clark,* see notes 54-57 and accompanying text *infra.* For a discussion of *Mendenhall,* see notes 31, 33, 75 & 76 and accompanying text *infra.* For a presentation and analysis of the proposition that a § 522(d)(10)(E) exemption is available only where a debtor enjoys a present right to receive the payments from the fund, see notes 53-57 and accompanying text *infra.*

11. The case was heard by Circuit Judges Gibbons and Becker, and Judge Weber of the United States District Court for the Western District of Pennsylvania, sitting by designation. Judge Gibbons wrote the majority opinion. Judge Becker filed a concurring opinion.

12. H.R. MILLER & M.L. COOK, A PRACTICAL GUIDE TO THE BANKRUPTCY REFORM ACT 6-7 (1979). In 1968, congressional hearings led to the appointment of the Commission on the Bankruptcy Laws of the United States. The Commission reported a vast increase in the number of bankruptcy filings in the preceding 20 years and a widespread feeling among judges and legislators that bankruptcy administration needed substantial improvement, and observed that current procedures were marked by disproportionate expenses to creditors and non-uniform application of the Act. *See id.*

who in good faith complies with its provisions an opportunity for a fresh start, free from creditor harassment and the pressures of excessive debt.[13]

It has long been recognized that economic rehabilitation requires not only that a debtor in bankruptcy receive a discharge from his existing debts but also that he be allowed to exempt some of his property from liquidation and distribution to creditors.[14] The Bankruptcy Act of 1898 (Act), the Code's predecessor, permitted a debtor to retain property exemptible under state law.[15] This approach led to disparate treatment of debtors under the widely divergent state law exemptions.[16]

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13. 9 AM. JUR. 2d *Bankruptcy* § 302 (1980). Congress noted that the Code reflects "a position that there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start." H.R. REP. NO. 595, 95th Cong., 2d Sess. 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087. *See also* Comment, *Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code*, 29 CATH. U.L. REV. 843 (1980). This commentator regards the enactment of the Code as "a major shift in the traditional balance between debtors' and creditors' interests in bankruptcy." *Id.* at 843. While noting that the Code strengthens creditors' rights by more clearly defining them, the "primary focus" of the Code "is to enable debtors to maintain their independent economic existences after bankruptcy." *Id.* at 843-44 (citing H.R. REP. NO. 595, *supra*, at 4-5).

While the Code has increased the priority of the fresh start doctrine, the policy is an inherent part of all bankruptcy systems. *See* Wetmore v. Markoe, 196 U.S. 68, 77 (1904). In *Wetmore*, the Court concluded that the purpose of bankruptcy laws was "to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, free from the obligations and responsibilities which may have resulted from his misfortunes." *Id.* A decade later, the Court observed that the Act's purpose was to distribute the debtor's assets to his creditors and then provide him with a fresh start. *See* Williams v. United States Fidelity Co., 236 U.S. 549, 554-55 (1915). This philosophy was reaffirmed by the Court in *Local Loan Co. v. Hunt*. *See* 292 U.S. 234 (1934). Denying the enforceability of an assignment of future wages, the Court noted that the fresh start doctrine

> has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. at 244 (emphasis supplied by the Court). For a brief synopsis of the evolution of the fresh start doctrine, see Comment, *supra*, at 846-50.

14. *See, e.g.*, Burlingham v. Crouse, 228 U.S. 459, 473 (1913) ("[i]t is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and then distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched"); *In re* Beckerford, 3 F. Cas. 26, 27 (C.C.D. Mo. 1870) (No. 1,209) ("the state, for its own purposes, and the well-being of the individual and family, has secured what are deemed necessaries, against the claims of creditors").

15. *See* Bankruptcy Act of 1898, ch. 541, § 6, 30 Stat. 544, 548 (1898) (amended by Chandler Act, ch. 575, § 1, 52 Stat. 840, 847 (1938)) (repealed 1978).

16. *See* UNIFORM EXEMPTIONS ACT, *supra* note 10, pref. note; COMMISSION REPORT, *supra* note 10, Part I, at 127; Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C.L. REV. 769 (1980). The prefatory note to the Uniform Exemptions Act observed that

> [s]tudents who have examined the exemption laws of the several states are always astounded by the enormous disparity that characterizes these

In response to the preceived unfairness of this disparity, and the inadequacy of state law exemptions in general, a judicial exemption of sorts was created.[17] In *Lines v. Frederick*,[18] the United States Supreme Court grafted the fresh start policy onto the definition of the "property" of the debtor which passed to the trustee under the Act.[19] "Property," the *Lines* Court held, did not include those assets of the debtor necessary to "give the debtor a 'new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.' "[20] In *Lines*, the debtor's vacation pay, accrued prior to the date of the bankruptcy filing but collectible only during the annual shutdown or upon termination of employment, was deemed necessary to his ability to make a fresh start and therefore

> laws. Some recognize no homestead exemption, and others allow a homestead to be claimed with hardly any effective limitation on its value. Some allow a practically unlimited exemption in an unmatured life insurance policy, whereas others restrict such an exemption to a policy of a specified face amount or to a policy acquired by a specified annual premium. Some allow the exemption of an automobile with little or no qualification, and others do not appear to recognize any exemption of an automobile.

UNIFORM EXEMPTIONS ACT, *supra* note 10, pref. note, at 366. One commentator has noted that because the state exemption laws have not been modernized, "dollar limitations on exempt property established years ago have been rendered unrealistic by the passage of time and the pressures of inflation." Vukowich, *supra* at 772.

17. *See* Comment, *supra* note 13, at 848-50. In addition to the disparate treatment guaranteed by varying state exemption provisions, debtors were faced with creditors who frustrated the purposes of bankruptcy laws either by taking liens on exemptible property, which were "consensual" and therefore enforceable, or by taking liens on other necessary property and then exacting a reaffirmation of the preexisting debt after discharge in order to avoid enforcement of the lien. *Id.* at 848-49. Fortunately, the courts were aware that these techniques, "coupled with antiquated state exemption laws, might deny debtors a fresh start under the Act by leaving them with a discharge and little else." *Id.* at 849.

18. 400 U.S. 18 (1970) (per curiam) (overruled by statute 1978).

19. *Id.* at 19. *See* Comment, *supra* note 13, at 849. *See also* Bankruptcy Act of 1898, ch. 541, § 70(a)(5), 30 Stat. 544, 565-66 (1898) (amended by Chandler Act, ch. 575, § 1, 52 Stat. 840, 879-80 (1938)) (repealed 1978). The Act provided that

> the trustee of the estate of a bankrupt . . . shall . . . be vested by the operation of law with the title of the bankrupt as of the date of the filing of the petition . . . except insofar as it is property which is held to be exempt, to *all of the following kinds of property* wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . .

Id. (emphasis added).

The Court in *Lines* observed that in defining the scope of the term "property," earlier cases had indicated that" ' "[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others." ' " 400 U.S. at 19 (quoting Segal v. Rochelle, 382 U.S. 375, 379 (1966) (quoting Fisher v. Cushman, 103 F. 860, 864 (1st Cir. 1900))).

20. 400 U.S. at 19 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (citations omitted by the *Lines* Court)).

it did not become property of the estate.[21]

In *Kokoszka v. Belford*,[22] the Supreme Court refused to extend the *Lines* exemption to income tax refunds which were based on earnings prior to the filing of the bankruptcy petition.[23] The Court rejected the argument that tax refunds should be treated like vacation pay because both were "wage based," noting that only the vacation pay in *Lines* was designed to function as a wage substitute at some *future* period and, during that *future* period, to 'support the basic requirements of life for [the debtors] and their families . . . .' "[24] The *Kokoszka* Court distinguished tax refunds, which it found were "not the equivalent of future wages for the purpose of giving the bankrupt a 'fresh start.' "[25]

Considerable confusion developed when the lower courts attempted to characterize various forms of retirement benefits under the *Lines* analysis.[26] Under one approach, the extent to which the debtor could control or withdraw the funds determined whether they were "sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start" that they should be treated as property of the bankruptcy estate.[27] In *Mason v. Eastman Kodak Co. (In re Parker)*,[28] where the

21. 400 U.S. at 18, 20. The Court observed that it had previously held that a business-generated loss carryback tax refund "was 'sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that it should be regarded as property under § 70(a)(5) [of the Bankruptcy Act].' " *Id.* at 20 (quoting Segal v. Rochelle, 382 U.S. 375, 380 (1966)). Applying this test, the Court excluded the vacation pay from the debtor's bankruptcy estate because

> [t]he wage-earning bankrupt who must take a vacation without pay or forgo a vacation altogether cannot be said to have achieved the "new opportunity in life and [the] clear field for future effort, unhampered by the pressure and discouragement of preexisting debt," which it was the purpose of the statute to provide.

Id. at 20 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citations omitted by the *Lines* Court)).

22. 417 U.S. 642 (1974).

23. *Id.* at 647-48.

24. *Id.* at 648 (quoting *Lines*, 400 U.S. at 20) (emphasis suplied by the *Kokoszka* Court). The *Kokoszka* Court reasoned that a tax refund was not necessary for a debtor's fresh start because it was not a periodic source of income required for the basic support of the debtor. *Id.* (citation omitted).

25. 417 U.S. at 647. "[T]herefore," the Court concluded, "the income tax refund is 'sufficiently rooted in the prebankruptcy past' to be defined as property under § 70(a)(5)." *Id.* at 648 (quoting Segal v. Rochelle, 382 U.S. 375, 380 (1966)).

26. For a discussion of cases representing inconsistent approaches, see notes 27-40 and accompanying text *infra.* Prior to *Lines*, characterizations of retirement benefits for purposes of defining the debtor's estate had been based on a number of considerations, including state law, the source of the benefits, and the beneficiary's vested interest. *See generally* Annot., 34 A.L.R. FED. 316 (1977).

27. *See* Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412 (Bankr. E.D.N.Y. 1981) (Keogh plan to which debtor's access was limited only by tax penalty constitutes property of the estate under § 70(a)(5)). For a further discussion of *Baviello*, see notes 32-34 and accompanying text *infra.*

28. 473 F. Supp. 746 (W.D.N.Y. 1979).

debtor's power to draw against his pension trust was limited to circumstances of hardship, the trust did not become property of the estate.[29] The *Parker* court reasoned that these restrictions effectively precluded use of the fund for any purpose other than the future support of the bankrupt and his dependents.[30] However, in *In re Mendenhall*[31] and *Eisenberg v. Baviello (In re Baviello)*,[32] Keogh plans which were subject to the debtors' unconditional right of withdrawal were deemed property of the estate.[33] As the *Baviello* court explained, the debtor's right to manage the fund and make withdrawals "are indicia that this fund need not function as a substitute for future wages" and thus it was properly treated as property available for distribution to creditors.[34]

In *Nunnally v. Nunnally (In re Nunnally)*[35] and *Turpin v. Wente (In re Turpin)*,[36] the Fifth Circuit held that pension benefits to which the debtors would not be entitled until some time in the future did not become property of the estate.[37] The Fifth Circuit did not address the issue in terms of the

29. *Id.* at 751. In *Parker*, the debtor would have been required to demonstrate "financial need and a serious medical or casualty emergency" to get a hardship withdrawal. *Id.* The *Parker* court also rejected the argument that the debtor's right to borrow against the fund constituted access sufficient to define the fund as property of the estate, noting that such loans were limited in both amount and duration, and prevented further participation in the plan. *Id.*

30. *Id.* Because the use of the fund was so limited, the *Parker* court determined that it was intertwined with the debtor's ability to make a fresh start and therefore preserved the fund for his benefit. *Id.* *See* Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412, 415 (Bankr. E.D.N.Y. 1981).

31. 4 Bankr. 127 (Bankr. D. Ore. 1980).

32. 12 Bankr. 412 (Bankr. E.D.N.Y. 1981).

33. *See* Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412, 415 (Bankr. E.D.N.Y. 1981) (Keogh fund from which debtor could withdraw at any time, subject only to a tax penalty, the lesser of his contributions or the account balance); *In re* Mendenhall, 4 Bankr. 127, 129 (Bankr. D. Ore. 1980) (prototype Keogh plan allowing withdrawal at any time).

34. 12 Bankr. at 415 (citing *In re* Mace, 16 COLLIER BANKR. CAS. (MB) 254 (Bankr. D. Ore. 1978) (debtor's Individual Retirement Account subject to such a high degree of control by the debtor that it is property included in the bankruptcy estate)). Neither the *Baviello* court nor the *Mace* court viewed the tax penalty as a sufficiently significant deterrent so as to constitute a limitation on the debtor's power of withdrawal. *See Baviello*, 12 Bankr. at 415. *See also Mace*, 16 COLLIER BANKR. CAS. (MB) at 261. For a discussion of the tax penalty as a restriction on access, see note 55 and accompanying text *infra*.

35. 506 F.2d 1024 (5th Cir. 1975).

36. 644 F.2d 472 (5th Cir. 1981).

37. *See Turpin*, 644 F.2d at 474-75; *Nunnally*, 506 F.2d at 1026. In *Nunnally*, the court excluded the debtor's Navy retirement benefits from his creditor's reach. 506 F.2d at 1025. In *Turpin*, the Fifth Circuit again excluded the debtor's retirement plans—two trusts—from the bankruptcy estate. 644 F.2d at 473-74. In *Turpin*, the Fifth Circuit expressly denied that its holding in *Nunnally* was based on the debtor's immediate need for the benefits, which would imply that the "fresh start" to which the debtor was entitled was intended only "to get the bankrupt back on his feet in the period immediately following the bankruptcy." *Id.* at 475. "Indeed," the court observed, "it appears that in *Nunnally* as here the bankrupt was not even entitled to receive any of these benefits until some time in the future." *Id.*

debtors' power to control the funds.[38] Instead, the court focused on the fact that the funds were designed to function as future wage substitutes.[39] As the *Turpin* court reasoned, "Providing the bankrupt with a 'fresh start' means assuring him that assets to which he may become entitled *in the future* will be acquired free of any pre-bankruptcy obligations."[40]

Thus, the proper treatment of retirement funds was not resolved under the Act, and it was in part "to obviate this analytical conundrum" that the Code was enacted, with a new approach to providing the debtor a fresh start.[41] Under the Act, title to exempt property remained in the bankrupt; exempt property was never included in the bankruptcy estate.[42] In contrast, section 541 of the Code provides that "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the bankruptcy estate, subject to later exemption.[43] The legislative history of section 541 reveals that Congress intended to include as property of the

38. *See Turpin*, 644 F.2d at 474-75; *Nunnally*, 506 F.2d at 1026. Since, in both cases, the funds were not subject to the debtors' control, this factor may have been implicit in the Fifth Circuit's conclusions. However, the court did not discuss the issue, nor did it cite any of the cases decided on this basis. *See id.* For a discussion of the cases treating the debtor's control over the retirement fund as dispositive, see notes 27-34 and accompanying text *supra.*

39. *Nunnally*, 506 F.2d at 1026 (citing Kokoszka v. Belford, 417 U.S. 642, 648 (1974) (if the interest is "designed to function as a wage substitute at some *future* period and during that *future* period, to support the basic requirements of life," then the property does not pass to the trustee) (emphasis supplied by the *Kokoszka* Court)).

40. *Turpin*, 644 F.2d at 475 (emphasis supplied by the court). The Fifth Circuit continued:

> Future wages may not be garnished to pay those obligations and pension benefits received in the future, even though they may be the product of pre-bankruptcy contributions to a pension fund, are a substitute for future wages and thus pass to the bankrupt free of the claims of pre-bankruptcy creditors.

Id.

41. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 578 (5th Cir. 1983). The legislative history of the Code noted that, under the Act, the law defining what was property of the estate was "a complicated melange of references to state law, and d[id] little to further the bankruptcy policy of distribution of the debtor's property to his creditors in satisfaction of his debts." H.R. REP. NO. 595, *supra* note 13, at 175 (footnote omitted). Nor were the debtor's interests adequately protected, for the nonuniform, antiquated and ineffective state laws

> presented debtors with a dilemma: they could refrain from seeking relief in bankruptcy far beyond the time at which they might realistically be able to pay their obligations, or they could file in bankruptcy and obtain a discharge from past liabilities at the cost of losing even those basic items necessary to carry on a civilized existence.

Comment, *supra* note 13, at 850.

42. *See* Lockwood v. Exchange Bank, 190 U.S. 294 (1903). *See also* Comment, *supra* note 13, at 851.

43. 11 U.S.C. § 541(a) (1982). *See* H.R. REP. NO. 595, *supra* note 13, at 367; S. REP. NO. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5868. The estate also includes "property which the debtor transferred prior to the commencement of the case but which is recoverable by the trustee pursuant to his avoidance powers, and certain property which the debtor received after the

estate even that property required for the debtor's fresh start, thereby overruling *Lines*.[44]

The expansive scope of section 541 means that most, if not all, retirement benefit plans are included in the property of the estate.[45] Although it

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commencement of the case." A. COHEN, *supra* note 1, ¶ 13-306.1, at 70 (citing 11 U.S.C. § 541(a)(3), (a)(5) (1982)).

There are two exceptions to this broad inclusion provision. The first excludes any power that the debtor may excercise solely for the benefit of an entity other than the debtor. *See* 11 U.S.C. § 541(b) (1982) (amended 1984). As an example, Professor Cohen cites "a power of appointment in a deed containing a clause permitting the debtor to revoke a grant and transfer the property to third persons other than for the grantor's own use." A. COHEN, *supra* note 1, ¶ 13-306.2, at 76. However, if the debtor receives any benefit from the excercise of this power, then the power is included in the estate. *Id.*

The second exception covers any beneficial interest of the debtor in a trust, a restriction on the transfer of which is enforceable under applicable non-bankruptcy law. *See* 11 U.S.C. § 541(c)(2) (1982). This exclusion generally applies to spendthrift trusts, which are protected from creditors in 40 states. *See* Vukowich, *supra* note 16, at 777 (citing G. BOGERT & G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 40, at 151 n.27, 152 n.29 (5th ed. 1973)). For a discussion of the cases analyzing this section's applicability to retirement funds, see note 45 *infra*.

44. *See* H.R. REP. NO. 595, *supra* note 13, at 368. The House Report states that § 541(a)(1) "has the effect of overruling Lines v. Frederick. . . . 400 U.S. 18." *Id.* (citing *Lines*, 400 U.S. at 18). *See also* S. REP. NO. 989, *supra* note 43, at 82. This legislative history, together with the broad language of § 541(a), led one commentator to conclude that it is no longer appropriate for courts to inject bankruptcy policy into discussion concerning the scope of the estate. *See* Epstein, *Property of the Estate*, in PRACTICING LAW INSTITUTE, BANKRUPTCY PRACTICE AND PROCEDURE 430 (1982) (Commercial Law and Practice Course Handbook Series No. 276). Though the Code overruled the *Lines* Court's definition of the scope of the debtor's estate, the *Lines* analysis was not completely disregarded. *See* Comment, *supra* note 13, at 851. That commentator compared the *Lines* approach and the Code approach, noting that

> the *Lines* decision and its progeny . . . sought to secure [the bankrupt's fresh start] by judicially "exempting" certain property from the administration of the bankrupt estate through the imposition of seemingly artificial constructions of the term "property." The Code, however, provides for the application of minimum federal exemptions to all the debtor's assets. This indicates a conscious congressional determination of the proper extent of the fresh start to be granted the debtor.

Id. (footnotes omitted).

45. *See, e.g.*, Barr v. Hinshaw (*In re* Hinshaw), 23 Bankr. 233 (Bankr. D. Kan. 1982) (employer funded, ERISA qualified profitsharing and pension plans included in estate) (citing *In re* Buren, 6 Bankr. 744 (M.D. Tenn. 1980) (Social Security benefits are property of the estate); *In re* Howerton, 21 Bankr. 621 (Bankr. N.D. Tex. 1982) (debtor-established Individual Retirement Annuity contracts are property of the estate); Clotfelter v. CIBA-GEIGY Corp. (*In re* Threewitt), 20 Bankr. 434 (Bankr. D. Kan. 1982) (ERISA qualified pension funded by employer and employee is property of the estate), *rev'd*, 24 Bankr. 927 (D. Kan. 1982)).

Various forms of retirement plans have been held to be property of the estate. *See, e.g.*, Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983) (ERISA qualified Keogh plan); Regan v. Ross, 691 F.2d 81 (2d Cir. 1982) (state pension plan); *In re* Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983) (employer-funded profitsharing and pension plans); *In re* Strasma, 26 Bankr. 449 (Bankr. W.D. Wis. 1983) (ERISA qualified Keogh and employer funded pension plans); *In re* Watson, 13 Bankr. 391 (Bankr. M.D. Fla. 1981) (debtor established and controlled cooperative investment plan). *Cf. In re* Berndt, 34 Bankr. 515 (Bankr. N.D. Ind. 1983) (ERISA qualified savings and enlarged the debtor's estate under the Code, Congress demonstrated its con-

profitsharing plan funded by both employee and employer). In *Berndt*, the bankruptcy court held that the debtor's control of, and access to, *his own* contributions to the plan qualified that portion of the fund as property of the estate. *Id.* at 517. But the *employer's* contributions, receivable only upon retirement, disability, termination of employment, or death, were not classified as property of the estate "because the debtor ha[d] no present right to withdraw those benefits and no legal right to demand them at the present time in a court of law." *Id.* (citations omitted).

The principal exception to this general inclusion concerns plans which contain restrictions on alienation or assignment, as required by law in order to receive favorable tax treatment. *See* Employee Retirement Income Security Act of 1974, §§ 206(d)(1), 1021(c), 29 U.S.C. § 1056(d)(1) (1982), I.R.C. § 401(a)(13) (1982); 26 C.F.R. § 1.401(a)-13 (1983). Section 1056(d)(1) requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1982). Section 401(a)(13) provides: "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." I.R.C. § 401(a)(13) (1982). Debtors have tried to exclude such plans pursuant to § 541(c)(2) of the Code, which provides that "[a] restriction on the transfer of the beneficial interest of a debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2) (1982).

Several courts have accepted the argument that the anti-alienation provisions required for favorable tax treatment do constitute such "restriction[s] on the transfer of . . . beneficial interest[s]," and have accordingly excluded the plans from the debtors' estates. *See, e.g.*, Clotfelter v. CIBA-GEIGY Corp. (*In re* Threewitt), 24 Bankr. 927 (D. Kan. 1982) (ERISA qualified pension funded by employer and employee) (since ERISA anti-alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee); *In re* Pruitt, 30 Bankr. 330 (Bankr. D. Colo. 1983) (ERISA-qualified thrift plan funded by employer and employee) (debtor's interest in ERISA fund is beyond reach of both general creditors and bankruptcy trustee); *In re* Rogers, 24 Bankr. 181 (Bankr. D. Ariz. 1982) (ERISA-qualified profitsharing and trust plan funded by employer) (benefits under ERISA plan receivable only upon retirement, disability, or death and not subject to garnishment are not property of the estate).

The legislative history of the Code is quite clear that § 541(c)(2) was intended to apply only to traditional spendthrift trusts. *See* H.R. REP. NO. 595, *supra* note 13, at 176 ("[t]he bill . . . continues over the exclusion from property of the estate of the debtor's interest in a *spendthrift trust* to the extent the trust is protected from creditors under applicable State law") (emphasis added). Later in the report's section-by-section analysis, the House Judiciary Committee reiterated: "Paragraph (2) of subsection (c) [of § 541], however, preserves restrictions on transfer of a *spendthrift trust* to the extent that the restriction is enforceable under applicable nonbankruptcy law." *Id.* at 369 (emphasis added). A "spendthrift trust" is one in which the beneficiary, by direction of the settlor or statute, may not assign or alienate his right to receive future payments from the trust. *See* G. BOGERT & G. BOGERT, *supra* note 43, § 40, at 147. The purpose of this type of trust is to protect the beneficiary from his own improvidence or incapacity. *Id.* Most courts have held that the ERISA anti-alienation provisions are merely tax-qualification requirements, not traditional spendthrift clauses, and thus are not within the scope of the § 541(c)(2) exception. *See, e.g.*, Samore v. Graham (*In re* Graham), 726 F.2d 1268 (8th Cir. 1984) (§ 541(c)(2) excludes only traditional spendthrift trusts); Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983) ("[s]ection 541(c)(2) . . . was never intended [by Congress] to include ERISA in its reference to 'applicable nonbankruptcy law' "); Regan v. Ross, 691 F.2d 81 (2d Cir. 1982) (§ 541(c)(2) does not apply to pensions for the following reasons: legislative history; statutory language directing use of pensions in Chapter 13 schedule; questionable enforceability of anti-alienation provisions against creditor under state law; and existence of pension exemption in § 522(d)(10)(E)); *In re* Strasma, 26 Bankr. 449

tinued commitment to the fresh start doctrine[46] by enacting a more comprehensive scheme of exemptions than previously existed.[47] Future wage

(Bankr. W.D. Wis. 1983) (§ 541(c)(2) applies only to traditional spendthrift trusts); Firestone v. Metropolitan Life Ins. Co. (*In re* DiPiazza), 29 Bankr. 916 (Bankr. N.D. Ill. 1983) (§ 541(c)(2) does not exclude ERISA qualified pension and profitsharing plans where debtor has access to benefits); *In re* Watson, 13 Bankr. 391 (Bankr. M.D. Fla. 1981) (ERISA spendthrift provisions relate only to tax qualification, not traditional spendthrift trust within § 541(c)(2)).

Finally, it is generally accepted that a settlor may not create a spendthrift trust with himself as beneficiary. *See* G. BOGERT & G. BOGERT, *supra* note 43, § 40, at 154. Accordingly, retirement plans in which the funds are either deposited by the employee or are fully available to him are generally held to have void spendthrift provisions. *See, e.g., Goff*, 706 F.2d at 587-88 (Keogh plan); *DiPiazza*, 29 Bankr. at 922 (pension and profitsharing plans to which debtor had full access); *In re* Howerton, 21 Bankr. 621 (Bankr. N.D. Tex.) (individual retirement annuity contracts), *supp. op.*, 23 Bankr. 58 (N.D. Tex. 1982).

46. *See* H.R. REP. NO. 595, *supra* note 13, at 126. The House Judiciary Committee reported:

> The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. The purpose has not changed . . . .

Id. One commentator explained the Code's approach to the fresh start doctrine:

> Section 522, together with the [code's] discharge provision, is central to the congressional scheme of providing debtors with a "fresh start." Permitting debtors to retain part of their assets while relieving them of all or most of their debts puts them on the road to a new financial future without the necessity of assistance from the state, charities or friends.

Vukowich, *supra* note 16, at 769 (footnotes omitted). *See also* A. COHEN, *supra* note 1, ¶ 13-301, at 54-55.

47. *See* 11 U.S.C. § 522(b) (1982). The Code now permits a debtor to choose between two sets of exemptions: those created by the Code itself, or those available under the laws of the debtor's state of domicile. *See id.* By establishing a set of federal bankruptcy exemptions and providing the debtor with a choice between the two schemes, § 522(b) represents "a significant departure from present law." H.R. REP. NO. 595, *supra* note 13, at 360.

The Code defines a broad new range of bankruptcy exemptions. *See* 11 U.S.C. § 522(b), (d) (1982). The Code permits the following exemptions, subject to the dollar limits imposed by § 522(d): the bankrupt's homestead; a motor vehicle; household and personal items of small value; jewelry; items related to the debtor's profession or trade; life insurance policies; the cash surrender value of unmatured life insurance policies; health aids; wage supplements or substitutes; support benefits; benefit plans; crime victim's reparation award; wrongful death awards; property traceable to life insurance policies or payments for bodily injury; and property traceable to payments in compensation for loss of future earnings. A. COHEN, *supra* note 1, ¶ 13-306.32.

These provisions were developed indirectly from the recommendations of the Commission on the Bankruptcy Laws of the United States. *See* H.R. REP. NO. 595, *supra* note 13, at 361 (§ 522(d) "was derived in large part from the Uniform Exemptions Act"); UNIFORM EXEMPTIONS ACT, *supra* note 10, pref. note, at 365 ("[t]he Uniform Exemptions Act . . . derived in considerable part from the proposals of the Commission on Bankruptcy Laws"). Thus, § 522(d) reflects the Commission's recommendation that "kinds of property that traditionally have been treated as exempt by state governments form the nucleus of the federal exemptions with appropriate federal maximums." COMMISSION REPORT, *supra* note 10, Part I, at 171.

However, these new federal bankruptcy exemptions are not applicable if the debtor's state of domicile has expressly legislated against their availability. *See* 11 U.S.C. § 522(b)(1) (1982). As of early 1983, 34 states had exercised this "opt-out" power. *See* Haines, *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 ARIZ. ST. L.J. 1, 4 & n.3. A constitutional argument has been raised to combat this surge of state activity: state exemption provisions, to the extent they diverge sharply from those of § 522(d), "are so at odds with federal policy as to be invalid under the supremacy clause." *Id.* at 18. However, the one decision in which this argument prevailed was reversed on appeal. *See* Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981), *rev'd*, 705 F.2d 159 (6th Cir. 1983). While other courts have indicated a willingness to consider the question, they have required the state law effectively to "obstruct the basic objectives of the federal law," a standard no challenger has met. *See In re* Parrish, 19 Bankr. 331, 334-35 (Bankr. D. Colo. 1982); *In re* Vasko, 6 Bankr. 317, 323 (Bankr. N.D. Ohio 1980). One reason this standard has not been met is that, in opting out of the federal bankruptcy exemptions, most states updated their own provisions. As Haines has observed:

> It can no longer be said that the exemption laws of most states are hopelessly archaic. Most states have amended their exemption statutes in the last five years. In virtually all of the [34] states that have opted out of the federal bankruptcy exemption scheme, the opt-out legislation accompanied or closely preceded review and amendment of the state exemption laws.

Haines, *supra*, at 15 (footnotes omitted).

The debtor's second alternative is to avail himself of the exemptions provided in the scheme of his state of residence or in federal nonbankruptcy law. 11 U.S.C. § 522(b)(2)(A) (1982). This alternative also allows a debtor to exempt an interest in property held as a joint tenant or tenant by the entirety, "to the extent that such interest . . . is exempt . . . under applicable nonbankruptcy law." *Id.* § 522(b)(2)(B).

The applicable state exemption scheme is determined by a residency test:

> The debtor's available state law exemptions are governed by the law of the state in which the debtor was domiciled for the longest portion of the 180-day period immediately preceding the date of the filing of the bankruptcy petition. This provision is intended to minimize, if not preclude, exemption shopping by an individual debtor who contemplates bankruptcy.

A. COHEN, *supra* note 1, ¶ 13-306.33[3] (footnote omitted).

The House Judiciary Committee provided a partial list of the federal nonbankruptcy exemptions:

> Foreign Service Retirement and Disability payments, 22 U.S.C. [§] 1104;
> Social Security payments, 42 U.S.C. [§] 407;
> Injury or death compensation payments from war risk hazards, 42 U.S.C. [§] 1717;
> Wages of fishermen, seamen, and apprentices, 46 U.S.C. [§] 601;
> Civil service retirement benefits, 5 U.S.C. [§§] 729, 2265;
> Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. [§] 916;
> Railroad and Retirement Act annuities and pensions, 45 U.S.C. [§] 228(L);
> Veterans benefits, 45 U.S.C. [§] 352(E);
> Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. [§] 3101; and
> Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. [§] 175.

H.R. REP. NO. 595, *supra* note 13, at 360.

substitutes previously immunized under *Lines*[48] are now analyzed under section 522(d)(10), which exempts "certain benefits which are akin to future earnings of the debtor."[49]

Section 522(d)(10)(E) exempts "[t]he debtor's right to receive . . . a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract . . . to the extent reasonably necessary for the support of the debtor . . . ."[50] Confronted with claims for exemption of various retirement plans,[51] courts have developed three distinct approaches to interpret-

48. For a discussion of the Supreme Court's analysis in *Lines*, see notes 18-21 and accompanying text *supra*. For a comparison of this approach and the Code approach, see note 44 *supra*.

49. H.R. REP.NO. 595, *supra* note 13, at 362. *See* 11 U.S.C. § 522(d)(10) (1982). In addition to the exemption of retirement plans in § 522(d)(10)(E), § 522(d)(10) exempts without limit social security benefits, unemployment compensation, local public assistance, veterans' benefits, and disability or illness benefits. *See id.* § 522(d)(10) (A)-(C). The Code also exempts "alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." *Id.* § 522(d)(10)(D).

50. 11 U.S.C. § 522(d)(10)(E) (1982). For the full text of § 522(d)(10)(E), see note 5 *supra*. As noted earlier, the Code's new set of federal exemptions was based primarily on the Uniform Exemptions Act, which, in turn, was based on the Commission Report. *See* note 47 *supra*. Section 6(a)(5) of the Uniform Exemptions Act, analogous to § 522(d)(10)(E), provides:

> § 6 (Property Exempt to Extent Reasonably Necessary for Support)
> (a) An individual is entitled to exemption of the following property to the extent reasonably necessary for the support of him and his dependents:
>
> . . . .
>
> (5) *assets held, payments made, and amounts payable under* a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service.

UNIFORM EXEMPTIONS ACT, *supra* note 10, § 6(a)(5), at 381-82 (emphasis added). The Commission Report adopted slightly different language in its § 4-503(c)(6):

> § 4-503 Exemptions
>
> . . . .
>
> (c) Other Property. The following property shall be allowed as exempt . . .:
>
> . . . .
>
> (6) before or after retirement, *such rights as the debtor may have* under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service, and which is either (A) qualified under section 401(a) of the Internal Revenue Code or any successor thereto, or (B) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents . . . .

COMMISSION REPORT, *supra* note 10, Part II, § 4-503(c)(6), at 125 (emphasis added). The emphasized language "assets held, payments made, and amounts payable under," and "such rights as the debtor may have under," became "the right to receive a payment under" in the final draft of § 522(d)(10)(E). *See* 11 U.S.C. § 522(d)(10)(E) (1982). For a discussion of this distinction, see note 10 *supra*.

51. Aside from claims under § 522(d)(10)(E), a few courts have been faced with claims for exemption under § 522(b)(2)(A). *See* Samore v. Graham (*In re* Graham), 726 F.2d 1268 (8th Cir. 1984); Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983); Barr v. Hinshaw (*In re* Hinshaw), 23 Bankr. 233 (Bankr. D. Kan. 1982). Sec-

ing section 522(d)(10)(E).[52]

The first approach focuses on the "right to receive a payment" language of section 522(d)(10)(E), and distinguishes between retirement funds on the basis of whether the debtor has a present or future entitlement to payments from the fund.[53] In *In re Richard Clark*,[54] the bankruptcy court held that the debtor could not exempt the assets in his Keogh plan because his right to receive payments under the plan would not accrue until some time in the future.[55] The court felt that section 522(d)(10)(E) was inapplicable where

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tion 522(b)(2)(A) permits a debtor who opts not to select the federal bankruptcy exemptions to choose those of his home state as well as those provided under "Federal law, other than subsection (d) of this section . . . ." 11 U.S.C. § 522(b)(2)(A) (1982). The basis for exempting pensions and other retirement plans under this provision is the restriction on assignment and alienation required by the Employee Retirement Income Security Act of 1974, a federal law. For a discussion of these restrictions, see note 45 *supra*. For a partial listing of other federal laws creating nonbankruptcy exemptions, see note 47 *supra*.

In *Hinshaw*, the bankruptcy court acknowledged that the House Judiciary Committee had not expressly stated that the ERISA rules created a federal exemption. *Hinshaw*, 23 Bankr. at 235. But after comparing the statutes which the House Report expressly listed with ERISA, the court held that the legislative histories of ERISA and § 522(b)(2)(A) of the Code indicated that ERISA did create a nonbankruptcy federal exemption. *Id.* at 235-36.

The two other courts reached the opposite conclusion. In *Goff*, the Fifth Circuit gave great weight to the absence of any reference to ERISA in the illustrative listing of federal exemptions, especially in light of the various specific references to ERISA elsewhere in the Code. *Goff*, 706 F.2d at 585. This factor, together with the fact that ERISA's anti-alienation provisions exist only for favorable tax status, and not as an absolute bar to alienation of pension benefits, led the Fifth Circuit to hold that ERISA plans are not within the "other federal exemption" category. *Id.* at 585-86. In *Graham*, the bankruptcy court also denied the § 522(b)(2)(A) exemption claim, on the grounds that if Congress had intended the ERISA provisions to exempt pension benefits from creditors, it would have drawn a more specific statute, instead of the general restriction which was intended only as a qualification for preferential tax status. *Graham*, 24 Bankr. 305, 311-12 (Bankr. N.D. Iowa 1982). On appeal, the Eighth Circuit affirmed this reasoning, and further distinguished the ERISA provisions from the nonbankruptcy federal exemptions by noting that the latter were "peculiarly federal in nature created by federal law or related to industries traditionally protected by the federal government." *Graham*, 726 F.2d at 1274. By contrast, the court explained, "ERISA regulates private employer pension systems." *Id.*

52. *See, e.g., In re* Richard Clark, 18 Bankr. 824 (Bankr. E.D. Tenn. 1982) (focusing on the distinction between present and future entitlement to benefits); *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981) (focusing on the amount reasonably necessary for the debtor's support); *In re* Mendenhall, 4 Bankr. 127 (Bankr. D. Ore. 1980) (denying availability of exemption for Keogh plans).

53. For a discussion of the legislative history of the phraseology of § 522(d)(10)(E), and specifically the "right to receive a payment" language, see note 50 *supra*.

54. 18 Bankr. 824 (Bankr. E.D. Tenn. 1982) (Keogh plan held by 37 year old doctor).

55. *Id.* at 828. The *Richard Clark* court attempted to distinguish *In re Donaghy*. *Id.* (citing *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981) (allowing exemption of pension benefits *already received* by the debtors)). For a discussion of *Donaghy*, see notes 62-65 and accompanying text *infra*.

The bankruptcy court in *Richard Clark* observed that the debtor had no *right* to the debtor "ha[d] no right to any present benefits, nor ha[d] he received any previous payment."[56] For this reason, the court did not decide whether the payments were "reasonably necessary" for the debtor's fresh start.[57]

The second approach to interpreting section 522(d)(10)(E) ignores the

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receive his Keogh payments. 18 Bankr. at 828. For a discussion of the prohibitions on premature withdrawal of Keogh fund assets, see note 2 *supra.* These restrictions do not create a legal barrier to receiving the funds; they serve only as the bases for granting favorable tax treatment to the funds. *See* I.R.C. §§ 72(m)(5), 401(d)(5)(C) (1982). Faced with a restriction on early withdrawal from a retirement plan which the debtor sought to exempt, one bankruptcy court noted that "[t]he penalty attached to early withdrawal may make it *undesirable* to do so, but does not affect the *legal right* of the debtor to exercise his withdrawal privilege." *In re* Watson, 13 Bankr. 391, 392 (Bankr. M.D. Fla. 1981) (emphasis added). Absent a specific, enforceable provision in Richard Clark's Keogh plan further denying this legal right, the funds do appear legally available, given that a beneficiary's right to receive Keogh funds vests upon contribution. *See* I.R.C. § 401(d)(2)(A) (1982).

56. *Richard Clark*, 18 Bankr. at 828 (distinguishing *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981)).

57. *Id.* at 829. The court's analysis of this issue is difficult to characterize due to its terseness. The critical language is as follows: "In the instant case the debtor is 37 years of age and actively engaged in the practice of medicine. At the present time he is receiving no payments under the plan. Thus, the court is not required to determine whether payments are 'necessary for the support of the debtor.' " *Id.* (quoting 11 U.S.C. § 522(d)(10)(E) (1982)).

The precedential value of *Richard Clark* is unclear because a subsequent decision rendered the federal exemption discussion unnecessary. The debtor's election of the federal bankruptcy exemptions had been challenged by the trustee because Tennessee, pursuant to § 522(b)(1), had opted out of the federal exemption scheme. *Richard Clark*, 18 Bankr. at 825. *See* TENN. CODE ANN. § 26-2-112 (1980). The court addressed the § 522(d)(10)(E) question only because another bankruptcy court had ruled the opt-out legislation unconstitutional. *Id. See* Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981), *rev'd*, 705 F.2d 159 (6th Cir. 1983). Subsequent to the *Richard Clark* decision, the constitutionality of the Tennessee opt-out was upheld. *See* Rhodes v. Stewart (*In re* Rhodes), 705 F.2d 159 (6th Cir. 1983). Accordingly, the § 522(d)(10)(E) analysis in *Richard Clark* became dictum, for once the opt-out was validated, "the debtor, of course, would be limited to those exemptions specified in the Tennessee statutes." *Richard Clark*, 18 Bankr. at 825 n.2. For a discussion of the state's option to deny the federal bankruptcy scheme's availability and the constitutionality of legislative action pursuant to such authority, see note 47 *supra.*

Two contrary analyses of the present-future distinction have been offered. The first is that retirement benefits to which the debtor has no present right of access are not included in the debtor's estate at all. *See In re* Berndt, 34 Bankr. 515, 517 (Bankr. N.D. Ind. 1983). According to this minority view, the question of the availability of an exemption under § 522(d)(10)(E) is thus never reached. *See id.* For an analysis of *Berndt* and a discussion of its distinct minority status, see note 45 *supra.*

The second view, based on one commentator's analysis of the Code's legislative history, is that § 522(d)(10)(E) exempts *only* those benefits to which the debtor has a future, not a present, right. *See* Vukowich, *supra* note 16, at 788. Looking to the legislative history of the Code, Professor Vukowich concludes that "[t]he exemption of these various support items [in § 522(d)(10), including retirement benefits,] seems to apply only to the 'right to receive' them in the future." *Id.* (quoting 11 U.S.C. § 522(d)(10) (1982) and citing H.R. REP. NO. 595, *supra* note 13, at 362 ("Paragraph (10) [of 522(d)] exempts certain benefits that are akin to *future* earnings of the debtor") (emphasis in original)).

present-future entitlement distinction and concentrates instead on the extent to which the benefits in question are "reasonably necessary for the support of the debtor."[58] A standard for determining what is reasonably necessary for the support of the debtor was enunciated by the Bankruptcy Court for the District of Connecticut in *Warren v. Taff (In re Taff)*.[59] The *Taff* court felt that the reasonably necessary standard "requires that the court take into account other income and exempt property of the debtor, present and anticipated."[60] After this accounting is completed, "the appropriate amount to be set aside for the debtor ought to be sufficient to sustain his basic needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs that a retired and elderly debtor may claim."[61]

In *In re Donaghy*,[62] the bankruptcy court allowed a section 522(d)(10)(E) exemption for pension plan proceeds which had been fully distributed in a lump sum payment to the joint debtors prior to the filing of the bankruptcy petition.[63] The court rejected the argument that the exemption should be disallowed because the debtors technically did not have any remaining "right to receive a payment."[64] Instead, the court looked to the debtors'

58. *See* 11 U.S.C. § 522(d)(10)(E) (1982). For the full text of § 522(d)(10)(E), see note 5 *supra*.

59. 10 Bankr. 101 (Bankr. D. Conn. 1981).

60. *Id.* at 107. In *Taff*, the bankruptcy court was faced with a debtor with an annual income of over $37,000, including an annual pension payment of over $29,000. *Id.* at 105. In addition to the pension payment, the debtor received over $6,700 in Social Security benefits annually, and had earned nearly $1,200 in interest income. *Id.* Moreover, he was able to exempt other assets exceeding $8,000. *Id.* at 107.

61. *Id.* at 107. The court observed that the House Judiciary Committee derived the federal exemption scheme largely from the Uniform Exemptions Act. *Id.* at 106 (citing H.R. REP. NO. 595, *supra* note 13, at 361). Although the court presumed that Congress deleted the Uniform Exemptions Act's definition of the "reasonably necessary" phrase in order to permit a case-by-case analysis, the standard which it applied is nearly identical to that proposed in the Uniform Exemptions Act. *Compare Taff*, 10 Bankr. at 107, *with* UNIFORM EXEMPTIONS ACT, *supra* note 10, § 6(b) (defining the phrase as "property required to meet the present and anticipated needs of the individual and his dependents, as determined by the courts after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual, including that which is exempt"). Accordingly, the *Taff* court, after noting the absence of any "special needs and responsibilities" of the debtor, allowed an exemption for only one-half of the pension payment. 10 Bankr. at 107.

62. 11 Bankr. 677 (Bankr. S.D.N.Y. 1981).

63. 11 Bankr. at 680. The debtors, husband and wife, were both in their sixties and suffering from medical ailments: Mr. Donaghy had emphysema; Mrs. Donaghy had cancer. *Id.* at 678. Aside from the retirement fund of over $20,000, which the debtors received when Mr. Donaghy lost his job as a result of his employer's relocation, the debtors' only other income was a disability payment of less than $500 per month. *Id.*

64. *Id.* at 679-80 (citing Turpin v. Wente (*In re* Turpin), 644 F.2d 472, 475 (5th Cir. 1981); Nunnally v. Nunnally (*In re* Nunnally), 506 F.2d 1024 (5th Cir. 1975)). The *Donaghy* court held that as long as the pension payment was intended as a substitute for future wages, it would be "an elevation of form over substance" to deny that a previously received benefit was not within the literal scope and spirit of

advanced ages, substantial medical expenses, and minimal resources and allowed the exemption in full on the grounds that the proceeds were reasonably necessary for the debtors' support.[65]

Courts taking the reasonable necessity approach have also allowed exemptions under section 522(d)(10)(E) for retirement benefits which the debtor would not have received until some time in the future.[66] In *In re Kochell*,[67] the district court acknowledged that debtors who did not presently need or receive retirement benefits could still exempt their future payments provided that there was some showing that the funds were reasonably necessary for future support.[68] However, because the debtor, a forty-four year old doctor, had a monthly income which exceeded his monthly expenses by $1,500.00, the court affirmed the denial of his section 522(d)(10)(E) exemption.[69] Even allowing that exemption provisions should be construed in favor of the debtor, the court regarded any asserted future need, on the facts of the case, as purely speculative.[70] In *In re Miller*,[71] the bankruptcy court held that section 522(d)(10)(E) was available to exempt future benefits provided that the debtor could point to some evidence of future need.[72] Based

§ 522(d)(10)(E). *Id.* at 680. For a discussion of *Turpin* and *Nunnally*, see notes 35-40 and accompanying text *supra.* By citing *Turpin* and *Nunnally*, two pre-Code cases, as authority for its ruling, the *Donaghy* court implicitly concluded that the Code would exempt that which the Act excluded: property needed for the debtor's fresh start. *See Donaghy*, 11 Bankr. at 679-80.

65. *Donaghy*, 11 Bankr. at 679-80. For a discussion of the debtors' special circumstances, see note 63 *supra.*

66. *See In re* Kochell, 31 Bankr. 139 (W.D. Wis. 1983), *aff'd*, 732 F.2d 564 (7th Cir. 1984); *In re* Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983).

67. 31 Bankr. 139 (W.D. Wis. 1983), *aff'd*, 732 F.2d 564 (7th Cir. 1984).

68. *Id.* at 140. The district court then quoted extensively from the opinion in *Warren v. Taff. Id.* For a discussion of the "reasonably necessary" standard as developed in *Taff*, see notes 59-61 and accompanying text *supra.*

69. *See In re* Kochell, 26 Bankr. 86, 87 (Bankr. W.D. Wis. 1982), *aff'd*, 31 Bankr. 139 (W.D. Wis. 1983), *aff'd*, 732 F.2d 564 (7th Cir. 1984). The debtor's income was approximately $36,000 per month, and he faced approximately $34,000 per month in expenses, as well as certain other costs relating to professional meetings and license maintenance. 26 Bankr. at 87.

70. 26 Bankr. at 87-88. The debtor had argued that a future need might arise which he could not satisfy, citing the possibility that his death could leave his children without the means to pay for their education. *Id.* at 87. After noting that "the future . . . contain[s] a more frightening uncertainty for 99.9% of the American population," the bankruptcy court concluded that it would render the "reasonably necessary" phrase meaningless for a court to "insure that no future misfortune could possibly lower the standard of living to which the debtor's dependents have become accustomed." *Id.* Moreover, as the bankruptcy court noted and the district court reiterated, given the debtor's monthly surplus, the retirement fund could be reestablished in a short period of time. *Id.*; 31 Bankr. at 141.

71. 33 Bankr. 549 (Bankr. D. Minn. 1983) (employer-funded pension and profit-sharing plans).

72. *Id.* at 552. After quoting the Code's legislative history "that § 522(d)(10) deals with 'benefits that are akin to future earnings of the debtor,' " the bankruptcy court concluded: "If it is true that this section deals with the right to future payments, then certainly the necessity for the debtor's support should also be considered

on a careful reading of *Richard Clark* and *Kochell*, the *Miller* court rejected the trustee's argument that payments must be currently necessary for the fifty-four year old debtor's support to be exemptible under section 522(d)(10)(E).[73] Adopting the *Taff* standard of reasonable necessity, the court allowed the debtor to retain the full $353.00 per month to which he would be entitled in the future.[74]

A third approach to section 522(d)(10)(E), suggested in dictum by the bankruptcy court in *In re Mendenhall*,[75] is to hold that the exemption is not available for assets held in Keogh plans.[76] Language in other cases[77] and evidence of contrary congressional intent with respect to the Keogh legislation[78] seem to cast doubt on this distinction, and no court has adopted it as a

in the future when the payments will be received." *Id.* (quoting H.R. REP. NO. 595, *supra* note 13, at 362).

73. *Miller*, 33 Bankr. at 552. The court acknowledged that in both *Richard Clark* and *Kochell* the claimed exemption for future benefits was disallowed:

> A careful reading of both opinions, however, discloses that both courts relied heavily on the young age of the debtors and thus their distance from retirement and their substantial incomes which would enable them to replenish their retirement plans sufficiently to provide for their retirements. I think that Congress intended these provisions to look to the debtors [sic] future needs as well as the debtor's current needs.

Id.

74. *Id.* at 553. For an analysis of the *Taff* court's "reasonably necessary" standard, see notes 59-61 and accompanying text *supra*. The *Miller* court acknowledged that the debtor would receive an unspecified amount of Social Security benefits in addition to the $353 monthly pension benefit once he retired. 33 Bankr. at 553 & n.9. Aside from the traditionally minimal level of Social Security benefits, the court so decided because the trustee failed to satisfy his "burden of proving that the exemptions are not property [sic] claims." *Id.* at n.9.

75. 4 Bankr. 127 (Bankr. D. Ore. 1980). The Code discussion was clearly dictum because the case was decided under the Act. *Id.* at 131-32.

76. *Id.* at 131-32. The judge stated:

> The bankrupt contends that his Keogh plan funds are entitled to exempt status based upon 11 U.S.C. § 522(d)(10)(E). Section 522(d)(10)(E) is part of the Bankruptcy Code which was enacted after the bankruptcy petition was filed in this case and therefore is not applicable. Furthermore, I find that the Keogh plan is not a "payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service."

Id. (quoting 11 U.S.C. § 522(d)(10)(E) (1982)).

77. *See, e.g.*, Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983); *In re* Richard Clark, 18 Bankr. 824 (Bankr. E.D. Tenn. 1982). Dictum in *Goff* indicated that the Fifth Circuit disagreed with the bankruptcy court's analysis in *Mendenhall*, and would exempt a Keogh plan pursuant to § 522(d)(10)(E) under the appropriate circumstances. *See Goff*, 706 F.2d at 579-80. This statement was also clearly dictum, because the debtors had chosen the state exemption scheme. *Id.* at 579. But the court did observe that"[t]he Goffs' [Keogh] plans did not contain the disqualifying characteristics and would have been covered by Section 522(d)(10)(E) to the extent 'reasonably necessary' for the Goffs' support." *Id.* at 579-80 (footnote omitted).

78. *See* S. REP. NO. 992, *supra* note 2, at 8. The report's analysis begins:

> The primary reason for the . . . bill . . . is to give self-employed persons access to retirement plans on a reasonably similar basis to that accorded corporate stockholder employees. It thus tends to correct a

basis for its decision.[79]

Against this background, the Third Circuit was called upon in *Robert Clark* to review the bankruptcy court's decision[80] that Keogh funds to which the debtor does not presently have access are not exempt under section 522(d)(10)(E).[81]

Judge Gibbons, writing for the majority, began by identifying the legislative purpose behind the Code's exemption provisions: to provide the debtor with the basic necessities of life in order to allow him to make a fresh start after liquidation.[82] According to the *Robert Clark* court, exempting *present* Keogh fund payments from the estate (and from the reach of creditors) would be consistent with this legislative purpose,[83] at least to the extent these payments were reasonably necessary for the debtor's support.[84]

However, Judge Gibbons continued, exempting a fund to which the debtor has no present right of access would go beyond the legislative policy of providing a fresh start.[85] Protection of *future* Keogh payments could only demonstrate a concern for the debtor's long-term security, a purpose for which Judge Gibbons found no support in the Code.[86] Accordingly, the

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> discrimination in present law under which self-employed individuals—sole proprietors and partners—are prevented from participating in retirement plans established for the benefit of their employees although owners-managers of corporations may do so.

Id. See also Plumb, *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1, 60 n.359 (1975). Plumb, a consultant to the Commission, said the Commission was aware of the potential inequities of including Keogh plans within the scheme of federal exemptions, and that this was one motivating factor in the inclusion of a "reasonably necessary" limitation. *Id.*

79. For a discussion of the approaches which courts have taken concerning retirement plans, see notes 51-74 and accompanying text *supra.*

80. Clark v. O'Neill (*In re* Robert H. Clark), No. 82-0494 (Bankr. D.N.J. 1982).

81. 711 F.2d at 22.

82. *Id.* at 23. Judge Gibbons explained the general purpose of the Code's exemption provisions:

> The historical purpose of [ ] exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. [This] purpose has not changed . . . .

Id. (quoting H.R. REP. NO. 595, *supra* note 13, at 126. For a discussion of the fresh start doctrine, see note 13 and accompanying text *supra.* For an analysis of the Code's approach to the doctrine, see note 46 and accompanying text *supra.*

83. 711 F.2d at 23. For a discussion of cases permitting exemption of retirement benefits to which the debtor had access, see notes 58-65 and accompanying text *supra.*

84. 711 F.2d at 23. For a discussion of cases applying the "reasonably necessary" standard, see notes 58-74 and accompanying text *supra.*

85. *See* 711 F.2d at 23. For a discussion of Judge Gibbons' rationale for distinguishing between immediate and long-term need, see notes 86-90 and accompanying text *infra.*

86. 711 F.2d at 23. While the exemption of present payments *was* necessary for the debtor's fresh start, Judge Gibbons noted that "[t]he exemption of *future* payments . . . demonstrates a concern for the debtor's long-term security which is absent from the statute." *Id.* (emphasis supplied by the court).

Third Circuit denied Clark's claim of exemption for future payments from his Keogh fund.[87]

Judge Gibbons regarded the Third Circuit's conclusion as consistent with preceding cases.[88] In particular, Judge Gibbons drew support from *Kochell's* holding, which denied an exemption for future pension payments.[89] To Judge Gibbons, the *Kochell* court would agree with the Third Circuit that the underlying purpose of the exemption was to alleviate present rather than long-term need.[90]

In a concurring opinion, Judge Becker agreed with the majority's conclusion that Clark was not entitled to exempt his Keogh fund assets from his bankruptcy estate because, by its terms, the plan terminated upon a judicial declaration of Clark's insolvency.[91]

Judge Becker wrote separately, however, because he questioned the court's interpretation of congressional intent with regard to the protection of the debtor's "long-term security."[92] The court's opinion, he believed, operated to disadvantage only self-employed individuals in this regard.[93] Judge

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87. *Id.* For a discussion of other limits on the receipt of Keogh funds prior to reaching the age of 59½, see note 2 *supra.*

88. 711 F.2d at 23. Judge Gibbons cited two cases in which bankruptcy courts had held that Keogh funds were not exempt from distribution to creditors. *Id.* (citing *In re* Richard Clark, 18 Bankr. 824 (Bankr. E.D. Tenn. 1982); *In re* Mendenhall, 4 Bankr. 127 (Bankr. D. Ore. 1980)). However, Judge Gibbons recognized that the authority of *Mendenhall* was subject to challenge because it was decided under § 70(a) of the Act, where the debtor's control of the funds was a significant factor. *Id.* & n.2. For a discussion of *Mendenhall,* see notes 31, 33, 75 & 76 and accompanying text *supra.* Similarly, the court suggested that *Richard Clark* was questionable precedent because the case was decided on alternative state and federal exemption grounds. 711 F.2d at 23. The *Richard Clark* court did so only because the Tennessee opt-out statute had been held unconstitutional, a decision which was reversed on appeal after *Richard Clark* was decided. For a discussion of this precedential weakness, see note 57 *supra.* For a full discussion of *Richard Clark,* see notes 54-57 and accompanying text *supra.*

89. 711 F.2d at 23 (citing *In re* Kochell, 26 Bankr. 86 (Bankr. W.D. Wis. 1982), *aff'd,* 31 Bankr. 139 (W.D. Wis. 1983), *aff'd,* 732 F.2d 564 (7th Cir. 1984)). For a discussion of the analysis in *Kochell,* see notes 67-70 and accompanying text *supra.*

90. 711 F.2d at 23. Judge Gibbons also cited, by way of comparison, *Donaghy* and *Taff,* two cases in which the bankruptcy courts exempted all and one-half of the debtors' *received* retirement benefits, respectively. *Id.* citing *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981); Warren v. Taff (*In re* Taff), 10 Bankr. 101 (Bankr. D. Conn. 1981)). For a discussion of *Donaghy* and *Taff,* see notes 59-65 and accompanying text *supra.*

91. 711 F.2d at 24-25 (Becker, J., concurring). Judge Becker concluded: "The funds either have been or are to be distributed, and Clark palpably has no right to receive payment under any plan on account of illness, disability, death, age or length of service. Under these circumstances, Clark was not entitled to an exemption." *Id.* at 25 (Becker, J., concurring).

92. *Id.* at 23-24 (Becker, J., concurring). For a discussion of the majority's analysis of the fresh start doctrine and its inapplicability to the debtor's long-term security, see notes 82-87 and accompanying text *supra.*

93. 711 F.2d at 24 (Becker, J., concurring). For a discussion of Judge Becker's views as to the causes of and solutions to this discriminatory effect, see notes 94-99 and accompanying text *infra.*

Becker stated that because Keogh plans and other similar retirement plans, such as Individual Retirement Accounts, are clearly property of the estate, while regular corporate employee pension and annuity benefits are not, the court's holding discriminated against self-employed individuals.[94] He felt that such a result conflicted with "Congress' manifest solicitude for retirement benefits for self-employed individuals."[95]

Judge Becker was reluctant to adopt the majority's interpretation of legislative intent because it required a result inconsistent with the congressional policy of protecting the retirement benefits of the self-employed.[96] He felt it would be equally plausible to infer that Congress intended to exempt all forms of retirement plans.[97] Although there was some indication in the legislative history that Keogh funds were not exempt,[98] Judge Becker did not view this evidence as sufficient to support the discriminatory result which the majority's conclusion required.[99]

94. 711 F.2d at 24 & n.1 (Becker, J., concurring). For a listing of cases concerning the inclusion of various retirement plans in the debtor's estate, see note 45 *supra.*

95. 711 F.2d at 24 (Becker, J., concurring). For a discussion of the legislative policy of protecting self-employed individuals as reflected in the Keogh legislation, see note 78 and accompanying text *supra.*

96. 711 F.2d at 24 (Becker, J., concurring). For a discussion of this conflict of policy, see notes 78 & 95 and accompanying text *supra.*

97. 711 F.2d at 24 (Becker, J., concurring). Judge Becker reasoned that

> [s]ection 522(d)(10)(E) exempts the debtor's right to receive payments "under a stock bonus, pension, profitsharing, annuity, or *similar plan* or contract on account of illness, disability, death, age, or length of service . . . ." A Keogh plan would seem to be "similar" to a pension or annuity plan, payments under both of which are exempt under this statute although they presumably represent long-term security arrangements.

Id. (quoting 11 U.S.C. § 522(d)(10)(E) (1982)) (emphasis supplied by Judge Becker).

98. *Id.* at 24 (Becker, J., concurring). Judge Becker recognized that Congress had rejected the more liberal language of both the Uniform Exemptions Act and the Commission Report, though it used both as guidelines. *Id.* & n.2. The Uniform Exemptions Act exempted "assets held, payments made, and amounts payable" under the various plans. UNIFORM EXEMPTIONS ACT, *supra* note 10, § 6(a)(5). The Commission Report recommended exempting, "before or after retirement, such rights [to different retirement benefits] as the debtor may have . . . ." COMMISSION REPORT, *supra* note 10, Part II, § 4-503(c)(6). However, the Code exempts only "[t]he debtor's right to receive a payment" under these plans. 11 U.S.C. § 522(d)(10)(E) (1982). Nevertheless, Judge Becker cautioned against using an unexplained language difference to establish a congressional intent which seemed contrary to previously expressed philosophies. 711 F.2d at 24 (Becker, J., concurring). Although the majority did not delve into the evolution of § 522(d)(10)(E), it reached the same conclusion regarding the effect of the language change as the bankruptcy court which had discussed the development of this exemption. *See id.* Judge Becker also expressed concern that the language of the bankruptcy court's opinion, insofar as it found a congressional intent to exclude Keogh plans from exemption, implied that even present Keogh payments would not be exempt. *Id.*

99. 711 F.2d at 24 (Becker, J., concurring). The legislative history provided some evidence of legislative intent, but Judge Becker cautioned:

> [I]t is not the strongest of evidence—there is nothing but the fact of the difference in language to go on. The legislative history nowhere discusses the changes made or their intended impact. I would thus be reluctant to

Judge Becker lamented that the "appropriate resolution of these issues is thus far from clear."[100] However, he was able to concur in the majority's judgment on the narrower ground that the terms of Clark's Keogh plan provided that the debtor's adjudication as bankrupt terminated the plan.[101]

Reviewing the court's opinion, it is initially submitted that the majority's premise that Clark had no "right to receive a payment" from his Keogh plan is subject to question.[102] It is clear that any withdrawal he would have made would have been subject to a tax penalty because he had not reached fifty-nine and one-half years of age.[103] However, several courts have indicated that this financial penalty does not affect the beneficiary's right to receive payments from the fund.[104] To the extent that the Third Circuit would exempt payments to which the debtor has a right of access, it is suggested that Keogh payments ought to be included within that exemption.[105]

It is also submitted that the court's analysis of the Code's treatment of the debtor's present and future security is inconsistent with the consensus of well-reasoned opinions interpreting section 522(d)(10)(E).[106] The Third

rely on this inference of intent, given the incongruity of the result for different retirement plans.

Id.

100. *Id.* Judge Becker suggested that Congress, because it may have overlooked the question, "focus its attention upon these matters." *Id.* n.3. (Becker, J., concurring).

101. 711 F.2d at 24-25 (Becker, J., concurring).

102. *See* 711 F.2d at 22-23. The Third Circuit affirmed the bankruptcy court's ruling, which it read to hold that "because Clark had no present right to receive payments from the plan, his exemption claim did not fall within the literal terms of section 522(d)(10)(E)." *Id.* at 22.

103. *See* I.R.C. § 72(m)(5) (1982). Since Clark was 43 years old, he would have faced a penalty tax of 10% in addition to the income tax due on the funds prematurely received. For a discussion of these restrictions on Keogh plans, see note 2 *supra.*

104. *See, e.g., In re* Watson, 13 Bankr. 391, 392 (Bankr. M.D. Fla. 1981). For a discussion of this aspect of *Watson*, see note 35 *supra. See also* Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412, 415 (Bankr. E.D.N.Y. 1981) (Keogh plan); *In re* Mace, 16 COLLIER BANKR. CAS. (MB) 254, 261 (Bankr. D. Ore. 1978) (IRA). In *Baviello* and *Mace*, cases decided under the Act, the debtor's control of the retirement fund determined whether the fund was included in the estate. *Eisenberg*, 12 Bankr. at 415; *Mace*, 16 COLLIER BANKR. CAS. (MB) at 261. Both cases held that the tax penalty did not constitute a restriction on access to the fund which affected the debtors' control. *Eisenberg*, 12 Bankr. at 415; *Mace*, 16 COLLIER BANKR. CAS. (MB) at 261. For a discussion of these cases in this respect, see note 34 *supra.*

105. The Third Circuit clearly held that present payments are exempt under section 522(d)(10)(E) "to the extent they are necessary for the support of the debtor." 711 F.2d at 23. If the majority would distinguish "present payments" from a present right to receive a payment, and hold that the latter are exempt only if currently received, it is submitted that such a distinction is as untenable as it is unwarranted. For a criticism of the majority's approach, see notes 121-25 and accompanying text *infra.*

106. *See In re* Kochell, 31 Bankr. 139 (W.D. Wis. 1983), *aff'g* 26 Bankr. 86 (Bankr. W.D. Wis. 1982), *aff'd*, 732 F.2d 564 (7th Cir. 1984); *In re* Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983); *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981); Warren v. Taff (*In re* Taff), 10 Bankr. 101 (Bankr. D. Conn. 1981). For a discussion of the approaches taken by these courts, see notes 58-74 and accompanying text *supra.*

Circuit acknowledged that the fresh start doctrine—which is designed to prevent the debtor whose assets are distributed to his creditors from becoming a public charge[107]—remained an integral policy of the Code.[108] Yet, while citing the *Donaghy* court's conclusion as comparative authority for its holding,[109] the majority ignored the essence of the *Donaghy* court's analysis that it is the character of the funds for which an exemption is claimed, not the timing of their disbursement, which determines the legitimacy of the exemption.[110] According to the bankruptcy court in *Donaghy*, section 522(d)(10)(E) and the fresh start doctrine combine to make the relevant inquiry whether the retirement benefit "is intended to function as a wage substitute at some future period" when it will be needed to "support the basic requirements of life" for the debtor, regardless of when it is received.[111]

The Third Circuit's principal reliance on *Kochell*,[112] it is submitted, reflects a fundamental problem of misconstruction. The court reads *Kochell* to

107. For a discussion of the fresh start doctrine, see note 13 *supra*.

108. *See* 711 F.2d at 23 (citing H.R. REP. NO. 595, *supra* note 13, at 126). For a discussion of the Code's approach to the fresh start doctrine, see note 46 *supra*.

109. *See* 711 F.2d at 23 (citing *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981)). The Third Circuit also cited, for comparison, *Warren v. Taff*. *See id.* (citing 10 Bankr. at 101). For a discussion of the *Donaghy* analysis, see notes 62-65 and accompanying text *supra*. For a discussion of the analysis in *Taff*, see notes 59-61 and accompanying text *supra*. The *Robert Clark* court apparently cited these cases for comparison because both granted at least some exemption under § 522(d)(10)(E) for retirement benefits which either had been or were being received. *See Donaghy*, 11 Bankr. at 679-80; *Taff*, 10 Bankr. at 107.

110. *See Donaghy*, 11 Bankr. at 670-80. The court characterized the trustee's argument that the debtors' exemption claim did not fall within the terms of § 522(d)(10)(E), because they had already been received, as "an elevation of form over substance." *Id.* The bankruptcy court continued:

> The identifiable sum, although received by the debtors before they could file their joint petition, is a tangible reflection of "the debtor's right to receive . . . a payment under a . . . pension . . . plan" within the literal language of Code § 522(d)(10)(E) and in the spirit of the Congressional intent to exempt qualified pension benefits that are "akin to future earnings of the debtor."

Id. at 680 (quoting 11 U.S.C. § 522(d)(10)(E) (1982); H.R. REP. NO. 595, *supra* note 13, at 362).

111. 11 Bankr. at 680. The *Donaghy* court had used the Fifth Circuit's analysis in *Turpin* and *Nunnally* as support for its conclusion that retirement benefits were an integral part of the debtor's fresh start because they would be necessary in the *future*. *See id.* at 679 (citing Turpin v. Wente (*In re* Turpin), 644 F.2d 472, 475 (5th Cir. 1981); Nunnally v. Nunnally (*In re* Nunnally), 506 F.2d 1024 (5th Cir. 1975)). For a discussion of *Turpin* and *Nunnally*, see notes 35-40 and accompanying text *supra*. While these cases were decided under the Act, they are relevant with respect to the scope of protection which the fresh start doctrine provides for retirement benefits. *See Donaghy*, 11 Bankr. at 679-80.

112. *See* 711 F.2d at 23. The majority recognized that the two other cases which it cited were of questionable precedential value. *See* 711 F.2d at 23 (citing *In re* Richard Clark, 18 Bankr. 824 (Bankr. E.D. Tenn. 1982); *In re* Mendenhall, 4 Bankr. 127 (Bankr. D. Ore. 1980)). For a discussion of the limited predential value of *Richard Clark*, see note 57 *supra*. For a discussion of the weakness of *Mendenhall* as authority for the Third Circuit's holding, see notes 75-76 and accompanying text *supra*.

support the proposition that "the underlying purpose of [section 522(d)(10)(E)] was to alleviate present, rather than long-term need."[113] But the bankruptcy court in *Kochell* held only that on the facts of that case there was no conceivable situation in which the funds could be considered necessary for the debtor's support, and that the section 522(d)(10)(E) exemption was not designed to protect against *any* future misfortune.[114] This language, it is suggested, does not support the conclusion that the Code was unconcerned with the debtor's long-term security; in fact, the district court in *Kochell*, affirming the bankruptcy court's denial of the exemption claim, expressly recognized that *future* needs ought to be considered, even in the absence of present need, if there is "some showing that the funds are reasonably necessary for future support."[115]

Further support for this proposition is provided by the holding and analysis of the bankruptcy court in *Miller*.[116] Reading *Kochell* and *Richard Clark* as relying on the youth of the debtors and their abilities to re-establish their retirement plans, the *Miller* court held that the debtor's future payments could be exempted if a future need were shown.[117]

Finally, Judge Becker, while raising the important question of the Code's concern for the debtor's long-term security,[118] concurred in the majority's judgment on equally infirm grounds.[119] By denying the exemption

113. 711 F.2d at 23.

114. *See Kochell*, 26 Bankr. at 87-88. For a discussion of the emphasis which the bankruptcy court in *Kochell* placed on the purely speculative nature of the debtor's claimed future need, see note 70 and accompanying text *supra*.

115. *Kochell*, 31 Bankr. at 140. As one example of such a situation, the district court cited a "debtor in ill health and declining years [who] could readily demonstrate that the funds would be reasonably necessary for his support." *Id.* at 141. However, the record in *Kochell* "disclose[d] no evidence whatsoever that the funds [were] necessary for the debtor's needs, either immediate or future." *Id.* at 140.

116. *In re* Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983). For a discussion of *Miller*, see notes 71-74 and accompanying text *supra*.

117. *Miller*, 33 Bankr. at 552. For a discussion of this aspect of the *Miller* court's analysis, see notes 72-73 and accompanying text *supra*. In fact, the *Miller* court, using the *Taff* standard, granted the claimed exemption, although the debtor had not yet begun receiving his benefits. *See Miller*, 33 Bankr. at 553. For a discussion of the *Miller* court's application of the *Taff* standard, see note 74 and accompanying text *supra*.

118. *See* 711 F.2d at 23-24 (Becker, J., concurring). However, it is submitted that Judge Becker's principal concern—that the majority's decision discriminates against self-employed individuals contrary to congressional intent—is unsupported by the case law. *See id.* For a discussion of Judge Becker's concern about this alleged discriminatory effect, see notes 92-96 and accompanying text *supra*. Given the breadth of § 541(a), Judge Becker's unsupported contention that "[t]he majority's holding will not affect employee pension and annuity plans created by employers, because the assets of such plans would not be included in the debtor's estate under section 541," is subject to question. *See Robert Clark*, 711 F.2d at 23-24 (Becker, J., concurring). For a discussion of cases supporting the proposition that § 541(a) includes most, if not all, retirement plans, including these employer-created plans, see note 45 and accompanying text *supra*. Thus, Judge Becker's concern about the scope of the majority's decision should extend to all forms of retirement plans.

119. 711 F.2d at 24-25 (Becker, J., concurring). For an analysis of Judge

claim because Clark had already received his benefits, Judge Becker disregarded the admonition of the *Donaghy* court against raising form over substance by refusing to consider whether the Keogh payments retained their character as future support payments.[120]

Analyzing the impact of the Third Circuit's decision in *Robert Clark*, it is submitted that the court has painted an inappropriate bright line to guide future courts in their interpretation of section 522(d)(10)(E).[121] The court's analysis would clearly deny an exemption claim for funds from which the debtor is not receiving payments.[122] It could also deny an exemption for future payments due under a plan from which the debtor *has* begun receiving benefits.[123] Such a result would destroy the principal purpose of section 522(d)(10)(E),[124] and reinforces the importance of assessing the degree to which a debtor's retirement benefits are reasonably necessary for his support.[125] Given the small and inconsistent body of case law interpreting section 522(d)(10)(E), it is imperative that Congress act to define its intentions

Becker's reasons for agreeing with the judgment of the court, see note 91 and accompanying text *supra*.

120. *See* 711 F.2d at 24-25 (Becker, J., concurring). The inconsistency between Judge Becker's concurring opinion and the *Donaghy* court's opinion could not be clearer. Judge Becker concluded that Clark was not entitled to an exemption because "[t]he funds either have been or are to be distributed, and Clark palpably has no right to receive payment under any plan . . . ." *Id.* at 25 (Becker, J., concurring). For a discussion of the *Donaghy* court's response to the same argument, see note 110 and accompanying text *supra*.

121. For a criticism of this approach, which fails to reach the reasonable necessity issue if there is no present payment, see notes 106-17 and accompanying text *supra*.

122. *See* 711 F.2d at 23. For a discussion of cases taking a contrary approach and looking to the reasonable necessity criterion as dispositive, see notes 66-74 and accompanying text *supra*.

123. It is true that the majority opinion, by citing *Taff* as comparative authority, probably does not contemplate denying an exemption for subsequent payments under a plan from which the debtor has begun receiving payments. But the entire thrust of the majority's analysis compares present and future payments and their impact on the debtor's short-term and long-term security. *See* 711 F.2d at 23.

The bankruptcy court is even more explicit. After discussing the history of the phraseology of § 522(d)(10)(E), the bankruptcy court concluded that "[t]he clear language of Section 522(d)(10)(E) limits such exemption to *payments made* under a plan such as the Keogh plan . . . ." Clark v. O'Neill (*In re* Clark), No. 82-0494, slip op. at 8 (Bankr. D.N.J. Sept. 28, 1982) (emphasis added). The "payments made" language, according to the bankruptcy court, contrasts with the "assets held . . . and *amounts payable*" language of the Uniform Exemptions Act, which Congress rejected. *Id.* at 7-8 (emphasis added). As Judge Becker observed, this "analysis would seem to foreclose exemption of Keogh assets even if a debtor's right to receive payment had vested because he or she had reached retirement age." 711 F.2d at 24 (Becker, J., concurring).

124. *See* H.R. REP. NO. 595, *supra* note 13, at 362 (§ 522(d)(10)(E) exempts "benefits akin to future earnings"). For a discussion of the essentially forward-looking nature of § 522(d)(10)(E), see *Miller*, 33 Bankr. at 552.

125. For a discussion of cases relying solely on the "reasonably necessary" provision, see notes 59-74 and accompanying text *supra*.

more clearly with regard to this section's applicability to future retirement fund benefits.[126]

Thomas G. Spencer

126. This view is shared by Judge Becker. *See* 711 F.2d at 24 n.3 (Becker, J., concurring).